UNITED NATIONS

General Assembly

FIFTY-FIRST SESSION

Official Records

SIXTH COMMITTEE
24th meeting
held on
Friday, 25 October 1996
at 10 a.m.
New York

SUMMARY RECORD OF THE 24th MEETING

Chairman: Mr. YAMADA (Japan)
(Chairman of the Working Group of the Whole on the Elaboration of a Framework Convention on the Law of the Non-Navigational Uses of International Watercourses)

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Distr. GENERAL
A/C.6/51/SR.24
12 March 1997
ENGLISH
ORIGINAL: SPANISH

96-81614 (E)

Mr. Yamada, Chairman of the Working Group of the Whole on the Elaboration of a Framework Convention on the Law of the Non-Navigational Uses of International Watercourses took the Chair

The meeting was called to order at 10.25 a.m.

AGENDA ITEM 144: CONVENTION ON THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES (continued)

1. The CHAIRMAN said that first of all the Chairman of the Drafting Committee would introduce its report (A/C.6/51/NUW/WG/L.1 and Corr.1 and 2, Add.1, Add.2 and Corr.1, Add.3 and Corr.1 and Add. 4). Then the Committee would have to consider the question of whether further meetings would have to be held and the brief report to be submitted to the General Assembly.

Report of the Drafting Committee

2. Mr. LAMMERS (Chairman of the Drafting Committee),* introducing the report of the Drafting Committee, said that it had held 19 meetings between 10 and 24 October. All delegations were to be commended for their cooperation and support. Even though, on certain issues, their views had differed sharply, they had made efforts to understand each other and attempted to reach compromises. In accordance with the provisions of General Assembly resolution 49/52 and the instructions given by the Working Group of the Whole, the Drafting Committee had taken as the basis for its work the text proposed by the International Law Commission and had examined the related amendments and proposals. It had maintained the division into six parts proposed by the Commission.

3. Parts I and II appeared in document A/C.6/51/NUW/WG/L.1 and Corr.1 and 2. The reservations and views of delegations wishing to have them expressly stated were contained in the footnotes, which were self-explanatory.

4. The Drafting Committee had made some stylistic changes in paragraph 1 of article 1. It had replaced "the present articles" by the "present Convention". In that paragraph and throughout the draft articles it had also replaced "measures of conservation and management" with "measures of protection, preservation and management" in order to align the text with the title of part IV.

5. No other changes had been made in article 1 since, as pointed out in document A/C.6/51/NWU/WG/L.1/Corr.2, draft paragraph 3, which had appeared in brackets, had been deleted. During the discussion of the article many delegations had expressed their belief that the future convention did not affect the right to exploit the living resources of international watercourses as such.

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* This statement has been given full coverage in the summary record in accordance with the decision taken by the Sixth Committee.

6. During the discussion of article 3 the question of the relationship of the convention with the existing watercourse agreements had been raised. The Drafting Committee had addressed that question in paragraph 1 of article 3. That paragraph provided that, in the absence of an agreement to the contrary, no provision of the convention would affect in any way the rights or obligations of a watercourse State arising from agreements in force for it on the date on which it became a party to the convention. It was clear that the draft articles established rights and obligations only for those watercourse States which had become parties to the convention.

7. Paragraph 2 addressed the related issue of whether watercourse States should harmonize their existing agreements with the convention. Differing views had been expressed on the issue in the Working Group of the Whole; the Drafting Committee's attempt to find a middle ground had not ended in consensus, and paragraph 2 had been placed in square brackets. It provided that, notwithstanding the provisions of paragraph 1, watercourse States which were parties to existing watercourse agreements should/or might, where necessary, consider harmonizing such agreements with the basic principles of the convention. Some delegations had favoured deleting the paragraph, while others had supported its retention. Furthermore, some delegations had favoured "should" and others "may". The Drafting Committee had decided to refer the bracketed text of paragraph 2 to the Working Group of the Whole for a final decision.

8. The Drafting Committee had been unable to complete its work on paragraph 3, which corresponded to paragraph 1 of article 3 proposed by the Commission. Two issues connected with the paragraph were still pending: the use of the words "apply and adjust", which had been placed in square brackets, and the effect of the convention on future watercourse agreements.

9. Paragraph 4 corresponded to paragraph 2 of the Commission's proposal, except in two respects. Firstly, in order to express more clearly the gist of the paragraph (that the agreements entered into by watercourse States with respect to the whole or part of a watercourse or a particular project, programme or use should not adversely affect to a significant extent the use of the watercourse by one or more other States) it had been proposed that "provided that the agreement does not adversely affect" should be replaced by "except insofar as the agreement adversely affects". Since views in the Drafting Committee had differed, both texts had been placed in brackets. Secondly, "except with their express consent" had been added at the end of the paragraph in order to make explicit what was already implicit in the text.

10. Paragraph 5 corresponded to paragraph 3 of the Commission's text. The Drafting Committee had made no changes but had bracketed the words "adjustment or application" pending a decision on their use in paragraph 3.

11. Paragraph 6 was new. During the discussion in the Working Group, it had been pointed out that there might be circumstances in which some but not all of the riparian States concluded an agreement amongst themselves. Some delegations in the Working Group had taken the view that the question of the effects of such agreements on the riparian States which were not parties to them would be resolved by general international law. Other delegations, however, had insisted

that the point should be stated expressly, so that paragraph 6 now reaffirmed that watercourse agreements between some but not all of the riparian States would have no effect on the rights and obligations under the convention of those riparian States which were not parties to such watercourse agreements.

12. In paragraph 2 of article 4, entitled "Parties to watercourse agreements", the term "where appropriate" had been added between commas after the words "on such an agreement and". The text now read: "consultations on such an agreement and, where appropriate, in the negotiation thereof in good faith with a view to becoming a party thereto, to the extent that its use is thereby affected". It was thus made clear that the participation of a third State in consultations with regard to an agreement to be concluded by other watercourse States would not lead in all cases to its participation in the actual negotiation of the text or affect its accession to the agreement in question. In particular, when only some of the provisions of the proposed agreement might affect the use of the watercourse by a third State, it might not be feasible for such a State to become a party to the agreement only with respect to such provisions.

13. Moreover, it was felt important to stress the notion of "good faith" in relation to such negotiations involving the States which had originally envisaged an agreement and a third State which had joined the negotiations because such an agreement might affect its use of the watercourse.

14. Turning to part II (General Principles), he said that it had been proposed in the Working Group that article 5, concerning equitable and reasonable utilization and participation, should include some new principles, such as sustainable development and protection of the ecosystem, in order to bring the draft articles more fully into line with contemporary international environmental law. Since a consensus had not been reached on the proposal, the relevant text had been placed in brackets.

15. The Drafting Committee had proposed adding a new paragraph 3 to article 6, entitled "Factors relevant to equitable and reasonable utilization". Paragraph 1 of the article provided for a non-exhaustive list of factors which should be taken into account in order to make certain that a particular use of the watercourse was equitable and reasonable. There was no hierarchy among those factors. The word "pedological" had been added in brackets in paragraph 1 (a); the addition had the support of some delegations but was opposed by others.

16. As to subparagraph (e) he drew attention to paragraph 4 of the Commission's commentary on article 6, which clearly stated that the subparagraph provided that the benefits as well as the negative consequences of a particular use should be taken into account in order to determine whether a particular use was equitable and reasonable.

17. In subparagraph (g) the Drafting Committee had replaced the words "corresponding value" by the words "comparable value", which it had considered to be more felicitous. The change did not affect the meaning of the subparagraph, for, as paragraph 4 of the Commission's commentary explained, those words conveyed the idea of "generally comparable feasibility, practicability and cost-effectiveness". Moreover, the words "availability of

alternatives" at the beginning of the subparagraph should be considered in conjunction with the Commission's commentary, which provided that the alternatives could take the form not only of other sources of water supply, but also of other means - not involving the use of water - of meeting the needs in question, such as alternative sources of energy or means of transport.

18. Paragraph 3, which was new, emphasized that there was no hierarchy among the factors listed in the subparagraphs of paragraph 1. The weight and importance of each factor were to be determined in comparison with those of other relevant factors. In addition, in determining what was a reasonable and equitable use, all relevant factors were to be considered together and a conclusion was to be reached on the basis of the whole.

19. There were two notes at the end of paragraph 3. The first note explained that certain delegations had proposed that the convention should include an explicit reference either in that article or somewhere else to the contribution to the watercourse by each watercourse State; it also explained that other delegations had disagreed with that proposal. The second note explained that certain proposals had been made concerning the question of sustainable development and the precautionary principle and that it had been decided to deal with those and similar issues in the context of paragraph 1 of article 5. The Drafting Committee had not had time to come back to the question.

20. In article 8, entitled "General obligation to cooperate", the words "and good faith" had been inserted after the words "mutual benefit". That addition, which did not affect the general tenor of the article, had been inserted because it had been felt that the principle of good faith was one of the bases of cooperation. The two expressions enclosed in brackets at the end of the article should be examined in the context of article 5, paragraph 1, and the second note relating to article 6.

21. In paragraph 1 of article 9, entitled "Regular exchange of data and information", the words "and related to the water quality" had been added after the words "and ecological nature" in paragraph 1, because it had been felt that the exchange of data and information in relation to the quality of water was important in the context of that article.

22. In paragraph 2 of article 10, entitled "Relationship between different kinds of uses", the words "the principles and factors set out in" had been deleted before the words "articles 5 to 7". That minor drafting change had no effect on the meaning of the article. Following a long discussion, the Drafting Committee had decided to retain the expression "vital human needs" at the end of paragraph 2, regarding which three delegations had reserved their position. As was explained in footnote 13, the expression was to be understood as stated in paragraph 4 of the Commission's commentary on article 10, in particular where the Commission noted that "special attention [was] to be paid to providing sufficient water to sustain human life, including both drinking water and water required for the production of food in order to prevent starvation".

23. Part III, "Planned measures", was contained in document A/C.6/51/NUW/WG/L.1/Add.1. The first article of that part was article 11, entitled "Information concerning planned measures". The Drafting Committee had

made no changes in the text proposed by the Commission. In article 12, entitled "Notification concerning planned measures with possible adverse effects", it had added the words "including the results of any environmental impact assessment" after the words "technical data and information". That addition, which did not affect the obligations set out under article 12, simply signified the importance attached to the environmental impact assessment and its utility in evaluating whether a particular planned measure would have adverse effects on other watercourse States.

24. In subparagraph (b) of article 13, entitled "Period for reply to notification", reference was now made to "planned measures" in the plural in order to align the subparagraph with subparagraph (a).

25. The Drafting Committee had divided article 14, entitled "Obligations of the notifying State during the period for reply", into two subparagraphs so as to make certain that the period of time mentioned at the beginning of the article applied to both the obligation of cooperation and the requirement not to implement the planned measure. That stylistic change did not affect the substance of the article.

26. The two paragraphs proposed by the Commission for article 15, entitled "Reply to notification", had been combined in a single paragraph in order to simplify drafting, without changing the meaning of the article. The first sentence of the paragraph required the notified States to communicate their findings to the notifying State as early as possible within the period applicable pursuant to article 13. The second sentence provided that if a notified State found that the implementation of the planned measures was inconsistent with the provisions of article 5 or article 7, it should attach to its finding a documented explanation setting forth the reasons for it.

27. In article 16, entitled "Absence of reply to notification", the Drafting Committee had introduced two minor drafting changes which did not affect the meaning of the article. In paragraph 1, the words "under paragraph 2 of article 15" had been replaced by the words "under article 15" because article 15 now consisted of only one paragraph. In paragraph 2, the Drafting Committee had moved the words "within the period applicable pursuant to article 13" from the end of the paragraph to the second line after the words "failed to reply", and had added the words "within that period" at the end of the paragraph.

28. In paragraph 1 of article 17, entitled "Consultations and negotiations concerning planned measures", the words "paragraph 2 of article 15" had been replaced by "article 15", since the article now consisted of only one paragraph. Since the obligation in question applied only if the notified State did not agree with the planned measures, the words "that implementation of the planned measures would be inconsistent with the provisions of articles 5 or 7" had been inserted after the words "under article 15".

29. There was a proposal to replace paragraph 3 by the text appearing in brackets at the end of the paragraph, in which the words "and for a further six months in the event fact-finding [was] requested" had been added after the words "for a period not exceeding six months". Those supporting the proposal had felt that if the watercourse States concerned invoked fact-finding, the

implementation of planned measures should be suspended, for otherwise the purpose of the fact-finding Commission would be frustrated. The addition had not been generally acceptable and had been placed in brackets.

30. In paragraph 1 of article 18, entitled "Procedures in the absence of notification", the words "serious reasons" had been replaced by the words "reasonable grounds" and, consequently, the word "reasons" at the end of the paragraph had been changed to "grounds". In the view of some delegations, the new language expressed more clearly the intention that reasons should not be frivolous and should be supported by documentation.

31. A proposal had been made to replace paragraph 3 by the text appearing in square brackets at the end of the paragraph, in which the words "and for a further six months in the event fact-finding [was] requested" had been added after the words "for a period not exceeding six months". The proposal had been based on the same reasons as the proposal which had been made for article 17, paragraph 3. Since the proposal had not gathered a consensus, it had been put in brackets.

32. In paragraph 2 of article 19, entitled "Urgent implementation of planned measures", the words "without delay" had been added after the words "shall be communicated" in the second line.

33. Part IV, entitled "Protection, preservation and management", was contained in document A/C.6/NUW/WG/L.1/Add.2. In article 20, entitled "Protection and preservation of ecosystems", the Drafting Committee had replaced the words "individually and jointly" with "individually and, where appropriate, jointly". The new wording was considered preferable as it reflected the Commission's intentions more clearly and avoided any misunderstanding.

34. In paragraph 2 of article 21, entitled "Prevention, reduction and control of pollution", the words "individually or jointly" had been replaced, as in article 20, by "individually and, where appropriate, jointly".

35. Turning to paragraph 3, he drew attention to corrigendum 1 of the previously mentioned document. As some delegations had expressed concern during the discussions in the Working Group that paragraph 3 seemed to put more emphasis on establishing lists of pollutants than on adopting any other means or method of pollution control, it had been agreed to redraft it. There were two views on the matter. According to the first, given the nature of the convention, the obligation of watercourse States to consult with a view to establishing means and methods for the prevention, reduction and control of pollution of international watercourses should be drafted in general terms. According to the second view, it would be useful to have a list of means and methods of pollution control. Accordingly, two proposals had been made for paragraph 3. One proposed to limit the text of the paragraph to the opening clause, so that it ended just before the words "such as". The other proposed to add to the opening clause the words "such as" and subparagraphs (a) to (c).

36. The Drafting Committee had made no changes in article 22, entitled "Introduction of alien or new species". In article 23, entitled "Protection and preservation of the marine environment", the text originally proposed by the

Commission had provided that watercourse States should "individually or jointly" take all measures with respect to an international watercourse that were necessary to protect and preserve the marine environment. It had been pointed out that compliance with the obligations set forth in that article sometimes required the cooperation of States which were not watercourse States. To meet those concerns, the Drafting Committee had replaced the words "individually or jointly" with the words "individually and, where appropriate, in cooperation with other States". The words "other States" included both watercourse States and non-watercourse States.

37. With regard to article 24, entitled "Management", it had become clear from the discussion on subparagraph 2 (b) that the words "protection and control of the watercourse" also covered water quality.

38. The Drafting Committee had made no changes in article 25, entitled "Regulation". In article 26, entitled "Installations", it had brought the opening clause of paragraph 2 into line with paragraph 1 of article 18 by replacing the words "serious reason" with the words "reasonable grounds". In addition, it had been agreed to replace the phrase "operation or maintenance" in paragraph 2 (a) with "operation and maintenance". Similarly, it had been agreed that subparagraphs (a) and (b) should not be considered as mutually exclusive. Consequently, the word "or" at the end of subparagraph (a) had been replaced with "and".

39. In part V, "Harmful conditions and emergency situations", article 27, entitled "Prevention and mitigation of harmful conditions", had been brought into line with article 20 and the words "individually or jointly" had been replaced with "individually and, where appropriate, jointly". The Drafting Committee had also added the words "related to an international watercourse" after the words "mitigate conditions" in the second line. The new addition made it clear that the obligation under that article was not open-ended. The article limited the obligation of watercourse States to take all appropriate measures to prevent or mitigate conditions related to an international watercourse that might be harmful to other watercourse States.

40. The Drafting Committee had made no changes in article 28, entitled "Emergency situations", on the understanding that the specific reference in it to international organizations was by no means intended to undermine the importance of cooperation, where appropriate, with competent international organizations on matters dealt with in other articles and, in particular, matters dealt with in the articles in part IV.

41. Part VI, "Miscellaneous provisions", was contained in document A/C.6/51/NUW/WG/L.1/Add.3. The Drafting Committee had not changed the first article in that part, article 29, entitled "International watercourses and installations in time of armed conflict". It had emerged from discussions in the Drafting Committee that article 29, as explained in paragraph 1 of the Commission's commentary, "simply serves as a reminder that the principles and rules of international law applicable in international and internal armed conflict contain important provisions concerning international watercourses and related works". In addition, as also explained in paragraph 2 of the Commission's commentary, "The principles and rules of international law that are

'applicable' in a particular case are those that are binding on the States concerned. Just as article 29 does not alter or amend existing law, it also does not purport to extend the applicability of any instrument to States not parties to that instrument."

42. The Drafting Committee had made no changes in article 30, entitled "Indirect procedures", or in article 31, entitled "Data and information vital to national defence or security". In article 32, entitled "Non-discrimination", it had deleted the words "or place where the injury occurred", which defined one of the grounds on which States could not discriminate. It had become clear that many delegations did not agree with keeping those words. They had been deleted so that general agreement could be reached. Also, the words "under its jurisdiction" had been replaced with "in its territory", a change which had no effect on the meaning of the article.

43. The text of article 2, on "Use of terms", was contained in document A/C.6/51/NUW/WG/L.1/Add.4. The Drafting Committee had made no changes in that article, except for reversing the order of subparagraphs (a) and (b).

44. At the end of his introduction, he expressed his regret that the Drafting Committee had not had enough time to complete its work. Article 7, on "Obligation not to cause significant harm", and article 33, on "Settlement of disputes", were still pending review. The Committee had also not had time to consider the preamble and the final clause, for which the Secretariat had been requested to prepare a preliminary draft. There had also been proposals and amendments put forward by other delegations.

ORGANIZATION OF WORK

45. The CHAIRMAN, addressing the issue of how the Working Group of the Whole should proceed from there, expressed the view that, firstly, the results achieved in recent weeks should not be discarded and there was no need to reconsider those draft articles of the convention on which agreement had already been reached, and that, secondly, the basic issue that still needed to be discussed was whether the Working Group should resume its work and, if so, when.

46. Following an animated exchange of views, which revealed significant differences of opinion on whether a resumption of work would require an extension of the session or the convening of a second session (given that, pursuant to paragraph 3 of General Assembly resolution 49/52, the Working Group's mandate expired on that very day) and on the most appropriate date for work to be resumed, the Chairman said he believed that the Working Group of the Whole had reached a consensus on two points: firstly, the results achieved so far should not be discarded and, secondly, the Working Group of the Whole should resume its work on a date to be determined later.

The meeting rose at 1.05 p.m.